Supreme Court, U.S.
FILED
APR 29 1997
CLERK

No. 96-896

In the Supreme Court of the United States

OCTOBER TERM, 1996

JEFFERSON COUNTY, ALABAMA, PETITIONER

v.

WILLIAM ACKER AND U.W. CLEMON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
DAVID ENGLISH CARMACK
THOMAS V.M. LINGUANTI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

25 pp

QUESTION PRESENTED

Whether a county government may impose its non-discriminatory "occupational" tax upon the pay or compensation of federal judges.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1-56) is reported at 92 F.3d 1561. The panel opinion of the court of appeals is reported at 61 F.3d 848. The opinion of the district court (Pet. Supp. App. 1-35) is reported at 850 F. Supp. 1536.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of Articles III and VI of the Constitution of the United States, of 4 U.S.C. 106, 110-111, and of the Jefferson County, Alabama, occupational tax (Ordinance No. 1120, Sept. 29, 1987), are set forth at Pet. App. 57-114.

STATEMENT

1. In 1967, the State of Alabama authorized its counties to impose "a license or privilege tax upon any person" who engages in a business or profession within the county and who is not required by any other law to pay such a tax to the county or the State (1967 Ala. Acts No. 406, § 4; Pet. App. 66-68; see Pet. Supp. App. 31). Pursuant to this authority, the Jefferson County Commission enacted the "Occupational Tax of Jefferson County, Alabama" in 1987 (Jeff. Cty. Ord. 1120 (Sept. 29, 1987); Pet. App. 69; see Pet. Supp. App. 31). Section 2 of this Ordinance states that it (Pet. App. 72):

> shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession * * * within the County * * * without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

The term "gross receipts" is defined by the Ordinance to include (Jeff. Cty. Ord. 1120, §1(F); Pet. App. 71):

> the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered * * * .

The term "gross receipts" does not include any compensation earned outside Jefferson County (Jeff. Cty. Ord. 1120, § 3; Pet. App. 72-73).

Jefferson County ordinarily collects its "occupational" tax from employers, who withhold the tax from employee wages. In the absence of withholding, however, employees are to remit the taxes directly to the County (Jeff. Cty. Ord. 1120, §§ 4, 5; Pet. App. 73-75). Persons who fail to comply with the Ordinance are subject to interest and penalties on the unpaid balance of the taxes (Jeff. Cty. Ord. 1120, § 10; Pet. App. 77-78). There are no criminal penalties for failing to pay the county's "occupational" tax (Pet. App. 26).

2. Respondents are federal district judges for the Northern District of Alabama. Most, but not all, of their duties as federal judges are performed at the federal courthouse located in Jefferson County. Pet. Supp. App. 32-33.

The State of Alabama has not directly imposed a "privilege, license or occupational" tax on the employment conducted by respondents. Pet. Supp. App. 33. The Jefferson County ordinance therefore applies to respondents and obligates them to pay an "occupational" tax of one-half of one percent of their "gross receipts" from the services they perform within the County (Jeff. Cty. Ord. 1120, § 2; Pet. App. 72). The

Administrative Office of the United States Courts has not withheld the county taxes from respondents' wages (Pet. Supp. App. 33), and respondents have not paid the taxes directly (*id.* at 34).

3. a. The County brought suit against respondents in the state district court of Jefferson County to collect the unpaid taxes (Pet. Supp. App. 1). Relying upon 28 U.S.C. 1442, respondents removed the action to the United States District Court for the Northern District of Alabama. That statute authorizes the removal to federal court of any civil or criminal proceeding commenced in a state court against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties" (28 U.S.C. 1442(a)(3)).

b. On cross motions for summary judgment, the district court held the county "occupational" tax to be unconstitutional as applied to federal judges (Pet. Supp. App. 1-31). The court reasoned that, even though the tax was calculated by reference to the income earned by respondents and was not imposed on the United States, the tax directly interfered with the operations of the federal judiciary and therefore violated the "intergovernmental tax immunity doctrine" derived from the Supremacy Clause of Article VI of the Constitution (Pet. Supp. App. 10-22). The court further concluded that application of the county tax to respondents would effect a reduction in their compensation in violation of the Compensation Clause of Article III of the Constitution (Pet. Supp. App. 24-30).

4. A panel of the court of appeals reversed. 61 F.3d 848 (1995). The panel noted that the county tax (i) applies to all forms of employment and does not discriminate against federal judges (*id.* at 852-853) and

(ii) is not imposed on the federal government directly (*id.* at 853-856). The panel concluded that the county tax is constitutional because, both in operation and effect, it merely taxes the income that respondents derive from employment (*id.* at 855):

> [O]nly if a federal employee is compensated [does] he or she become[] liable to Jefferson County for the occupational tax. A federal employee in Jefferson County could refuse to pay any license fees and still lawfully perform his or her federal duties under the ordinance *so long as that employee received no income from performing those duties.* Consequently, the occupational tax is not a *precondition* to the performance of any federal government functions but a *consequence* of receiving any compensation therefor.

Because the county has simply imposed a nondiscriminatory "income tax" on respondents (*id.* at 856), the panel concluded that the tax does not violate the intergovernmental tax immunity doctrine and does not unconstitutionally diminish respondents' compensation (*id.* at 856-857).

5. a. On rehearing *en banc*, the court of appeals vacated the panel decision and affirmed the district court (Pet. App. 1-36), with three judges dissenting (*id.* at 37-49). The court of appeals acknowledged that, under this Court's decision in *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939), if the county tax were merely an "income tax" on federal employees, it would not violate the doctrine of intergovernmental tax immunity (Pet. App. 19). The court further recognized that it is a question of federal law whether the county tax is, in substance, an "income tax" for this

purpose. The court nonetheless concluded that it would look to state law to determine "the attributes comprising the substance" of the county tax (*ibid.*).

The court noted that, in *McPheeter* v. *City of Auburn*, 259 So. 2d 833 (1972), the Alabama Supreme Court stated that a local occupational tax constitutes a license or "privilege" tax—rather than an income tax—under state law (Pet. App. 19-20). Based upon the theory that the county tax is imposed on the "privilege" of performing the federal judicial function, rather than on the "income" of federal judges, the court of appeals held that the tax violates the doctrine of intergovernmental tax immunity (*id.* at 20-22):

> The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Although the court acknowledged that the "legal incidence" of the county tax falls on respondents as individuals, the court concluded that the actual incidence of the tax is on the "privilege" of performing judicial duties (*id.* at 22-23). The court stated that federal judges are "federal instrumentalities" in their performance of judicial duties and that the county tax thus "amounts to a direct tax on federal instrumentalities in violation of the intergovernmental tax immunity doctrine" (*id.* at 25).

b. The court of appeals then considered whether Congress has consented to the imposition of such taxes. The court held that the Public Salary Tax

Act—in which Congress consented to taxation of the "pay or compensation" of federal officers or employees (4 U.S.C. 111)—does not consent to imposition of a "privilege" tax on federal judges (Pet. App. 29-31). The court distinguished *United States* v. *City of Pittsburgh*, 757 F.2d 43, 47 (1985), in which the Third Circuit held that a local "privilege" tax was, in substance, an "income tax" that could be imposed under the Public Salary Tax Act on the official transcript fees received by a federal court reporter (Pet. App. 31 n.19). The court of appeals stated, without elaboration, that the ordinance involved in *City of Pittsburgh* "did not include the factors" that made the Jefferson County ordinance a "privilege" tax (*ibid.*).

The court of appeals also held that the Buck Act does not consent to the imposition of a "privilege" tax on federal judges (Pet. App. 32-36). That statute provides that "[n]o person" is to be relieved of liability for a state or local "income tax * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area" (4 U.S.C. 106(a)). The statute defines the term "income tax" to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c). The court of appeals acknowledged that the county tax was "within the Buck Act's definition of an 'income tax'" (Pet. App. 33). The court stated, however, that the Jefferson County tax on the "privilege" of working as a federal judge is a direct tax on "the United States or an[] instrumentality thereof" (4 U.S.C. 107(a)) and is therefore prohibited by the express terms of the Act (Pet. App. 33).

In reaching this conclusion, the court of appeals sought to distinguish this Court's decision in *How-*

ard v. *Commissioners of the Sinking Fund*, 344 U.S. 624 (1953). In *Howard*, the Court held that the Buck Act authorized application of a Louisville tax on the "privilege" of conducting business to persons who were employed at a naval ordnance plant located within the city. *Id.* at 627-629. The court of appeals stated that the sole question in *Howard* was whether "Louisville lacked jurisdiction to tax in a federal area" (Pet. App. 35). By contrast, the court stated, the issue in this case is whether the local tax is a direct tax on a federal instrumentality that violates the intergovernmental immunity of the United States (*ibid.*). The court stated that the fact "that *Howard* upheld the application of the Louisville license fee to federal employees does not imply that the Buck Act precludes an intergovernmental tax immunity challenge to the application of Ordinance No. 1120 to federal judges" (*id.* at 36). The court explained that (*ibid.*):

> Unlike federal judges, employees of a naval ordnance plant realistically can be viewed as separate entities from the federal government when performing their duties * * * .

c. Because the court of appeals concluded that the challenged tax violated the intergovernmental tax immunity of the United States, and was not authorized by the Public Salary Tax Act or the Buck Act, the court stated that it was unnecessary to address whether the tax also violated the Compensation Clause of Article III of the Constitution (Pet. App. 10).

DISCUSSION

The court of appeals erred in concluding that the county tax is unconstitutional as applied to federal judges. Congress has consented to the imposition of state and local taxes assessed upon the "pay or compensation" received by federal officers and employees. 4 U.S.C. 111. The fact that such a tax may be labelled a "privilege" tax under state law does not vitiate that consent. Review by this Court is warranted both by the importance of the question presented and because the decision in this case conflicts with the reasoning and conclusion of the Third Circuit in *United States* v. *City of Pittsburgh*, 757 F.2d 43 (1985).

1. Neither the parties nor the courts below addressed whether this state court tax collection suit was properly removed to federal court. 28 U.S.C. 1442(a)(3) authorizes the removal to federal district court of any "civil action * * * commenced in a State court" against "[a]ny officer of the courts of the United States, for *any act under color of office or in the performance of his duties*" (*ibid.*; emphasis added). The statute permits a federal judge to remove a case commenced against him in state court if a federal defense is pleaded to the state claim (*Mesa* v. *California*, 489 U.S. 121, 136 (1989)) and if the state claim is "for any act under color of office or in the performance of his duties" (28 U.S.C. 1442(a)(3)). The first of these two requirements is plainly met in this case. The second, however, is not clearly established, for the courts below have not addressed whether the state court action was commenced against respon-

dents "for any act under color of office or in the performance of [their] duties" (*ibid.*).[1]

Because the parties did not address this question in the courts below, it is unclear what contentions they would raise. If the petition for a writ of certiorari is granted, the Court may wish to direct the parties to address this jurisdictional question in their briefs on the merits of the case.[2]

2. The court of appeals erred in concluding that Congress has not consented to the challenged county tax.[3] The Public Salary Tax Act unequivocally provides that "[t]he United States consents to the taxa-

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[1] Although the county tax is calculated upon the *income* that respondents receive for the performance of their duties, it is not clear that respondents' refusal to pay the tax was an act under color of office or in the performance of duty.

[2] "If at any time before final judgment [in a case removed to federal court] it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. 1447(c).

[3] The court of appeals did not consider whether Congress has consented to the tax under the Public Salary Tax Act (4 U.S.C. 111) or the Buck Act (4 U.S.C. 105 *et seq.*) until *after* the court had concluded that the tax violated the constitutional doctrine of intergovernmental tax immunity. As this Court has frequently observed, however, a constitutional issue should be reached only after non-constitutional bases for decision have been resolved. *Califano* v. *Yamasaki*, 442 U.S. 682, 692-693 (1979); *Bowen* v. *United States*, 422 U.S. 916, 920 (1975); *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960). This practice is rooted in the Court's reluctance to decide "abstract, hypothetical or contingent" constitutional questions. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 284 (1969). It is appropriate first to address whether Congress has consented to the challenged tax because, if such consent has been given, it is irrelevant whether, in the absence of such consent, the tax would be unconstitutional.

tion of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. 111. The history and the text of this provision reflect that a nondiscriminatory local tax imposed on compensation from employment may be applied to any "officer or employee of the United States" (*ibid.*) without regard to whether that tax is labelled, under state law, as an "occupation" tax, a "privilege" tax, or an "income" tax.

a. The Public Salary Tax Act is intimately connected with the modern development of the intergovernmental tax immunity doctrine. See *Davis* v. *Michigan Deparment of the Treasury*, 489 U.S. 803, 811-812 (1989). Under this doctrine, "States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." *United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977) (footnote omitted). For many years, the intergovernmental tax immunity doctrine was broadly applied to prohibit state taxation of the salaries of officers and employees of the United States (*Dobbins* v. *Commissioners*, 41 U.S. (16 Pet.) 435 (1842)) and to prohibit federal taxation of the salaries of state officials (*Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1870)). See *Davis* v. *Michigan Department of the Treasury*, 489 U.S. at 810-812. In *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), however, the Court declined to follow these authorities—and implicitly overruled *Collector* v. *Day*—by holding that the federal income tax could validly be imposed on employees of the New York Port Authority. One year later, in *Graves* v. *New York ex*

rel. O'Keefe, 306 U.S. 466, 480 (1939), the Court overruled the entire line of cases from *Dobbins* v. *Commissioner* through *Collector* v. *Day*. As this Court explained in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. at 811:

> After *Graves*, * * * intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.

The Public Salary Tax Act was considered by Congress during the period when the Court was in the process of narrowing, and ultimately abandoning, the *Dobbins-Day* line of cases. After the Court held in 1938 in *Helvering* v. *Gerhardt*, *supra*, that the federal government could impose nondiscriminatory taxes on state employees, Congress determined that federal officers and employees should be subject to similar state taxes. In the Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575, the predecessor to 4 U.S.C. 111, Congress therefore expressly consented to nondiscriminatory state taxation of the "pay or compensation" of federal officers and employees. See H.R. Rep. No. 26, 76th Cong., 1st Sess. (1939); S. Rep. No. 112, 76th Cong., 1st Sess. (1939).

Shortly before the Public Salary Tax Act was enacted, however, this Court entered its decision in *Graves* v. *New York ex rel. O'Keefe*, *supra*. The practical effect of the Public Salary Tax Act was thus to codify the intervening result in *Graves* and thereby foreclose "the possibility that subsequent judicial reconsideration of [*Graves*] might reestablish the broader interpretation of the immunity doctrine." *Davis* v. *Michigan Department of the Treasury*, 489

U.S. at 812. The purpose of the Act is thus plainly to abandon, not preserve or extend, the immunity of federal officers and employees from nondiscriminatory state taxation.

b. The proper interpretation of the Public Salary Tax Act must, of course, begin with its language. See, *e.g.*, *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995). Under this Act, the United States consents to nondiscriminatory state or local taxation of the "pay or compensation for personal service" received by any "officer or employee of the United States" (4 U.S.C. 111). Because the local ordinance challenged in this case taxes the "pay of compensation" that respondents receive for the "personal service" they provide as officers of the United States, and does not discriminate in doing so, the tax comes within the plain language of the consent that Congress has given to state and local taxation.[4]

The language of the county ordinance, of course, does more than simply impose the tax. It also states that it is "unlawful for any person" to be employed within the County "without paying" the tax (Jeff. Cty. Ord. 1120, § 2; Pet. App. 72).[5] The court of appeals

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[4] The district court (Pet. Supp. App. 8-9) correctly held that the county tax does not "discriminate against the officer or employee because of the source of the pay or compensation" (4 U.S.C. 111). The *en banc* court of appeals stated that, "[o]n this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it" (Pet. App. 9 n.9).

[5] The tax is imposed on the "gross receipts" from employment within the County. That term is defined to mean "compensation" and includes "the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind" (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71).

held that the tax is beyond the scope of the statutory consent because, (i) under state law, the ordinance imposes a tax on the "privilege" of working, rather than a tax on the "income" received from work (Pet. App. 29-31; see *id.* at 19-20, citing *McPheeter* v. *City of Auburn*, 259 So. 2d 833 (Ala. 1972)) and (ii) a tax imposed on the "privilege" of working as a federal judge constitutes a direct tax on the United States to which Congress has not consented (Pet. App. 31).

The court of appeals erred, however, in looking to the label, rather than the substance, of the challenged tax. Whether the County's occupational tax is imposed on "pay or compensation" within the scope of the consent granted by the Public Salary Tax Act (4 U.S.C. 111) is a question of federal law. See *Howard* v. *Commissioners of the Sinking Fund*, 344 U.S. 624, 628-629 (1953); *United States* v. *City of Pittsburgh*, 757 F.2d 43, 47 (3d Cir. 1985). This Court has emphasized that, in determining the validity of a state tax whose burden falls upon the federal government or its employees, "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 280 (1932). It is therefore necessary to "look through form and behind labels to substance" (*City of Detroit* v. *Murray Corp. of America*, 355 U.S. 489, 492 (1958)) and to go beyond the "bare face of the taxing statute to consider all relevant circumstances" (*United States* v. *City of Detroit*, 355 U.S. 466, 469 (1958)). See also *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977) (the constitutionality of a state tax on the "privilege of doing business" under the Commerce Clause does not turn merely on the legislative phrasing, for such "formalism merely obscures the

question whether the tax produces a forbidden effect").

In its "practical operation" and effect, the county tax is simply a tax on the "pay or compensation" that respondents receive for their services to the United States and is therefore within the consent provided by 4 U.S.C. 111. The tax is imposed only if a person earns "gross receipts" or receives "compensation" in the form of "salaries, wages, commissions, [or] bonuses" while employed within the County (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71). See note 5, *supra*. Even though phrased as a "privilege" tax, it is imposed only on income as it is received. The tax does not operate as a prerequisite or precondition of employment; it is therefore indistinguishable in its practical operation and effect from other forms of income taxation.

The court of appeals was unduly swayed by the language of the ordinance that makes it "unlawful" for a person not to pay this "occupational" tax (Pet. App. 26-27). It is, by definition, "unlawful" for any person to fail to pay a tax imposed by law. If a State could not make it "unlawful" for a federal officer to fail to pay a tax, the tax could not be enforced; if the tax could not be enforced, it would then hardly be relevant whether Congress had, or had not, consented to it.

The only "punishment" imposed for a failure to pay the county tax is interest and penalties on the unpaid tax (Jeff. Cty. Ord. 1120, § 10; Pet. App. 77). The fact that Ordinance 1120, in this manner, makes it "unlawful" for anyone to fail to pay the tax does not take the tax outside the scope of the statutory consent. The tax does not discriminate against federal officers and employees; it is imposed on the "pay or compensation"

that they receive from their employment (4 U.S.C. 111); it is therefore within the scope of the statutory consent.

c. The decision in this case conflicts with the decision of the Third Circuit in *United States* v. *City of Pittsburgh*, 757 F.2d 43 (1985). In that case, the City of Pittsburgh imposed a "business privilege tax" on persons doing business in the city at the rate of five mills per dollar of gross receipts. The United States challenged the application of this "privilege" tax to the official transcript fees of a federal court reporter in the United States District Court for the Western District of Pennsylvania. The Third Circuit concluded, however, that the local "privilege" tax was within the scope of the consent provided by the Public Salary Tax Act, 4 U.S.C. 111. In so holding, the court of appeals disregarded the fact that the Pennsylvania Supreme Court had ruled that the local tax was a "privilege" tax rather than an "income tax" under state law. 757 F.2d at 47. The court of appeals held that federal law, not state law, determines whether the local tax is imposed on the "pay or compensation" (4 U.S.C. 111) of a federal officer. 757 F.2d at 47. The court explained that, in enacting the Public Salary Tax Act, Congress intended that federal employees "should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits which are accorded to persons engaged in private occupations." *Ibid.*, quoting S. Rep. No. 112, *supra*, at 4. The court stated that the statutory consent to the taxation of the "pay or compensation" of federal officers must be read broadly to comport with that legislative intent. *Ibid.* The court further noted that, in enacting the Public Salary Tax Act, Congress was aware "that the states

used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Ibid.*, citing S. Rep. No. 112, *supra*, at 6-10. Because the "business privilege tax" challenged in *City of Pittsburgh* was imposed on the "gross receipts or gross income from the [transcript] fees," the court concluded that Congress consented to the imposition of the tax under 4 U.S.C. 111. 757 F.2d at 47.

d. The Buck Act, 4 U.S.C. 105 *et seq.*, reinforces this understanding of the scope of the consent to state taxation contained in the Public Salary Tax Act. Under the Buck Act, a person who receives "income from transactions occurring or services performed" in a "Federal area" is subject to "any income tax" levied by a state or local government "to the same extent" as if the income was received in an area that is "not a Federal area." 4 U.S.C. 106(a).[6] The term "income tax" is defined for this purpose to mean "any

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[6] The term "Federal area" is defined broadly in the Buck Act to mean "any lands or premises held or acquired by or for the use of the United States" (4 U.S.C. 110(e)). This definition appears, by its terms, to encompass premises used by the United States for the purposes of operating a federal courthouse. The origin and purpose of the Buck Act, however, was more limited: the statute was designed to ensure that federal officers and employees who reside or work within exclusive federal enclaves would be treated equally with those who reside and work outside such areas. See S. Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940); *United States* v. *Lewisburg Area School Dist.*, 539 F.2d 301, 309 (3d Cir. 1976). Because the Public Salary Tax Act broadly consents to any tax imposed on the "pay or compensation" of federal employees (4 U.S.C. 111), it is unnecessary to decide whether the Buck Act itself authorizes application of state and local "income taxes" to the salaries of federal judges as compensation for "services performed" in a "Federal area."

tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c).

The Buck Act (Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059) and the Public Salary Tax Act (Act of Apr. 12, 1939, ch. 54, § 4, 53 Stat. 575) were both enacted by the same Congress. In adopting the broad definition of the term "income tax" contained in the Buck Act, Congress was aware that States impose a variety of taxes on income that are designated by terms other than "income tax"—such as "corporate-franchise" taxes or "business-privilege" taxes. S. Rep. No. 1625, *supra*, at 5. Congress sought to ensure that state and local governments are authorized to impose taxes measured by the income or receipts from federal employment regardless of how the tax was labelled or described. *Ibid.*

In *Howard* v. *Commissioners of the Sinking Fund*, 344 U.S. 624 (1953), this Court held that the Buck Act consented to the imposition of a municipal "license fee" (of one percent of the wages and "other compensations earned by every person in the City") on employees who worked at a federal ordnance plant. *Id.* at 625 n.2. The employees had claimed in *Howard* that the local "license fee" was not an "income tax" within the scope of the Buck Act because the Kentucky Court of Appeals had held that "this tax was not an 'income tax' within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City" (*id.* at 628, citing *City of Louisville* v. *Sebree*, 214 S.W.2d 248, 253-254 (1948)). This Court rejected that argument (344 U.S. at 628-629):

> [T]he right to tax earnings within the area was not given Kentucky in accordance with the

> Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts.

In dissent in *Howard*, Justice Douglas (joined by Justice Black) urged a contrary point of view that is echoed in the reasoning of the court of appeals in the present case (*id.* at 629 (citation omitted)):

> I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses, professions, and occupations. Many kinds of income are excluded, *e.g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of Appeals held it to be. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States.

The decision of the court of appeals in this case errs for the same reasons that the Court rejected the formalistic interpretation of the statute proposed by the dissent in *Howard*. Both in substance and practical effect, the county ordinance challenged in this case imposes a tax on income received from federal employment, and nothing more. Congress expressly consented to the imposition of such nondiscriminatory state and local taxes upon the "pay or compensation" of federal officers and employees. 4 U.S.C. 111.

3. The decision of the court of appeals holds a county ordinance unconstitutional and, in doing so, conflicts with the decision of another circuit with respect to a sensitive matter of federal-state relations. Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. In addition to the question presented in the petition, the Court may wish to direct the parties to address whether this case is within the removal jurisdiction of the federal courts under 28 U.S.C. 1442(a)(3).

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
DAVID ENGLISH CARMACK
THOMAS V.M. LINGUANTI
Attorneys

APRIL 1997